FILE COPY

IN THE

Supreme Court of the United States

1946

OCTOBER TERM, 1945

No. 489

EDWARD E. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

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IN THE

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No. 489

EDWARD F. ZAP,

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PETITION FOR REHEARING.

To the Honorable Chief Justice Harlan F. Stone and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward F. Zap, respectfully petitions for rehearing upon the following grounds, to-wit:

I.

This case raises special and important questions of fundamental law relating to constitutional rights of private persons holding government contract never heretofore determined by this Honorable Court and also raises fundamental questions of criminal procedure which have not heretofore been, but should be, determined by this Honorable Court.

The case is also decided by the Circuit Court of Appeals for the Ninth Circuit in conflict with applicable decisions of this Court relating to constitutional rights and other matters of criminal law and procedure. It has also decided important questions of general law in a way untenable and in conflict with the weight of authority. (Rule 38(5b), U. S. Supreme Court.

II.

The petitioner is one of the foremost experimental inventors in the world. He has been aeronautical consultant for the United States Navy since the Lindbergh flight. [R. 556, 560, 561.]

The judgment in the District Court involving two counts of violation of Title 18, Section 80, both relating to the same transaction, provides for imprisonment of nine months and for a fine of $2,000.00 on each count [R. 69], and the effect of the judgments being affirmed would be to deprive him of being able to serve the Navy and other branches of the government in the experimental work in which he is so skilled.

In the Circuit Court, the judgments were affirmed without opinion on the merits, because of asserted non-conformance with a rule of court regarding specification of errors. (151 F. (2d) 100.) We beliexe this rule was erroneously construed.

The questions raised in this case involve the violation of the defendant's constitutional and statutory rights under the Fourth and Fifth Amendments to the Constitution of the United States, and certain fundamental questions of procedure relating to the indictment, selection of jurors, sufficiency of evidence and instructions of the Court in which errors vitally and prejudicially affecting

petitioner occurred. This Court has never permitted either rules of court or mere technicalities to deprive an accused of fundamental and constitutional rights.

It is, therefore, important that a rehearing be granted, and that certiorari be granted to determine the law with reference to these fundamental rights. Where this Court has even denied certiorari, it has later, on petition for rehearing, granted the same and reserved the case where fundamental constitutional rights were called to its attention.

White v. Texas, 310 U. S. 530.

This Court has repeatedly granted hearings where convictions were based upon evidence unlawfully secured, in violation of an accused's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

McNabb v. U. S., 318 U. S. 332;

Amos v. U. S., 255 U. S. 313, 65 L. ed. 654;

Goldman v. U. S., 316 U. S. 129, 86 L. ed. 1322;

Gouled v. U. S., 255 U. S. 298, 65 L. ed. 647;

Jack Davis v. U. S., Number 404 (1945 Term).

Or where the evidence is insufficient and should be directed:

Keegan v. U. S., 89 Law Edition 1314 (Nos. 39-44, October, 1944 Term);

Schneiderman v. U. S., 320 U. S. 118, 136.

Or where the Court failed to instruct the jury on the law relating to the only issues involved.

Screws v. U. S., 89 L. Ed. 1029.

Or where fundamental matters of criminal procedure in violating liberty are involved.

Miller v. U. S., 317 U. S. 192, 87 L. Ed. 179;
Edwards v. U. S., 312 U. S. 473, 482.

Or where the Circuit Court has not passed on issues presented by an adequate assignment of errors.

Lonergan v. U. S., 82 L. Ed. 630.

Wherefore, petitioner prays that a rehearing be granted and that certiorari be granted.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

Certificate of Counsel.

I do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and I do further certify that said petition is not interposed for the purpose of delay.

MORRIS LAVINE.

Subscribed and sworn to before me this 27th day of December, 1945.

MARGUERITE F. CRIPPS.
Notary Public in and for the State of California, County of Los Angeles.

My commission expires January 3, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 489

EDWARD F. ZAP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF THE WRIT OF CERTIORARI.

Opinion Below.

The opinion of the Circuit Court of Appeals [R. 805-807] is reported in 151 Fed. (2d) 100, 101.

Jurisdiction.

The decision of the Circuit Court of Appeals affirming the judgment below was filed June 4, 1945. [R. 807,808.] A petition for rehearing, duly filed, was denied September 13, 1945. [R. 809.] The petition for writ of certiorari was filed October 8, 1945, and was denied December 10, 1945. December 11, 1945, the Court stayed its order denying certiorari and granted leave to file a petition for rehearing and another brief in support of the petition for certiorari.

The jurisdiction of the Supreme Court is conferred by Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules 11 and 13 of the Criminal Appeals Rules promulgated by the Supreme Court May 7, 1934. The petition for rehearing is filed pursuant to Rule 33 of the Rules of the Supreme Court, and supporting brief is filed pursuant to the order of this Court of December 11, 1945.

Questions Presented.

For the questions presented, reference is made to those questions set out in the Petition for the Writ of Certiorari. (Petition pp. 19 to 23.)

Reasons for Allowing the Writ.

Reference is made to the reasons set out in the Petition (pp. 24 to 26).

Statutes Involved.

Title 18, Section 80 (presenting false claims). The Fourth and Fifth Amendments to the U. S. Constitution: Title 18, Sections 611-616, regarding such warrants: U. S. Code, Title 50, Section 643 (First War Powers Act), and the President's Executive Order 9127; Title 28, Section 411, U. S. Code, regarding selection of jurors according to state practice; Code of Civil Procedure of California, Section 204.

Specification of Errors.

The Court is respectfully referred to that part of the Petition which sets forth the questions presented (pp. 19 to 23), and to that part which sets forth the reasons for the allowance of the writ (pp. 24 to 26). We set forth as specification of errors each of the matters therein set forth and as set forth in our assignment of errors in the record [R. 754-773] and the additional errors of procedure in the Circuit Court of Appeals.

Summary of Facts.

Reference is made to the facts as set out in the Petition (pp. 3 to 18), as though fully set out here.

Summary of Argument.

I.

THE DISTRICT AND CIRCUIT COURTS ERRED IN REFUSING TO SUPPRESS THE EVIDENCE AND IN PERMITTING THE BOOKS AND RECORDS SEIZED WITHOUT A SEARCH WARRANT TO BE INTRODUCED IN EVIDENCE TO CONVICT THE PETITIONER. [Assignments of Error 12, 13, 15, 16, 17, 22.]

II.

THE DISTRICT COURT ERRED IN FAILING TO GIVE THE JURY ANY INSTRUCTIONS AS TO THE APPLICABLE STATUTES ON THE CASE, AND THE DECISIONS OF THE COURTS BELOW ARE, THEREFORE, IN CONFLICT WITH THIS COURT'S HOLDING IN SCREWS V. U. S., 89 L. ED. 1029 AT 1039.

III.

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY THAT THE WORD WILLFUL MEANS "CONDUCT MARKED BY CARELESS DISREGARD AS TO WHETHER OR NOT THE THING DONE IS LAWFUL." [R. 689.]

IV.

THE DISTRICT COURT ERRED IN FAILING TO DIRECT THE VERDICT.

ARGUMENT.

I.

The District and Circuit Courts Erred in Refusing to Suppress the Evidence and in Permitting the Books and Records Seized Without a Search Warrant to Be Introduced in Evidence to Convict the Petitioner. (Assignments of Error 12, 13, 15, 16, 17, 22.)

As the Government has conceded that the search warrant of December 1, 1943 is based upon an insufficient affidavit, the search and seizure of petitioner's books and records, Government's Exhibits 32 to 45, were in violation of the defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States and the timely motion to suppress the same in advance of trial should have been granted. Furthermore, the use of these books and records in evidence over strenuous objections violated the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States. The Government contended in the Court below and contends here that the authority of the Navy Department to inspect the books and records of a Navy contractor by a Navy cost inspector was sufficient grounds for giving another agency of the Government, not authorized by statute or executive order, namely, the Federal Bureau of Investigation, the right to make not only an inspection but to search and seize the books and records of a prime defense contractor, without any search warrant, and permits their use in evidence, without any process or showing of probable cause, in a criminal prosecution of the defense contractor. This we assert is error, and the statute and executive orders permitting inspection did not and does not nullify the protection and guarantees of the Fourth and Fifth Amendments.

The questions thus raised have never been passed on by this Honorable Court, and are fundamental.

The record shows that on October 20, 1942, two agents of the Federal Bureau of Investigation came into Zap's plant while Zap was away and began going over the books and records from day to day. [R. 151 *et seq.*] They had no search warrant or any legal process or pretended process. A Navy civilian inspector named Greenfield objected to their looking at the Navy books and records, and refused to give Mr. Myerson of the F. B. I. the books as he had not seen a search warrant, but Myerson insisted they had a right to do so, saying "I have a right to do this. I am a member of the F. B. I. and whatever I see fit to do, I account for myself." [R. 150.]

Hilton Byars, a senior accountant, a civilian, employed by the United States Navy, filed an affidavit in which he stated that two F. B. I. agents, to-wit, Murray B. Myerson and James C. Sloane, connected with offices at Los Angeles, for a period of six or seven weeks, commencing on or about October 20, 1942, made an audit and inspection of the books of account and record of Edward F. Zap at Zap's place of business, 1005 Broxton Avenue, Los Angeles, California, "under the auspices of and by and with the authority of your affiant and Lieutenant Lucien Smith Minor of and for the United States Navy." [R. 193-194.]

Byars stated:

> "That at all times during said period from on or about October 20, 1942, to and including the 1st day of December, 1942, all said books of account and records of Edward F. Zap pertaining to and under said contracts were within the custody of the United States Navy, pursuant to said contracts and

the terms and provisions thereof, and said United States Navy refused and declined to permit any person whatsoever to remove any of said books of account and records, or either of them, without a warrant." [R. 195.]

On December 1st, F. B. I. agent Myerson, who had been conducting the search for six or seven weeks, made an application for a search warrant and an affidavit in support thereof. [R. 177-178.] This affidavit is now acknowledged to have been faulty.

(a) Do the statutes and executive orders permitting inspection of prime defense contractors' books as construed and applied by the courts below in the instant case contravene the defendant's constitutional rights guaranteed against search and seizure under the Fourth and Fifth Amendments to the Constitution, where F. B. I. agents were permitted by a Navy auditor to inspect books without any process or search warrant, and thereafter the agent seized the books without any affidavit showing probable cause or sufficient in its context to form the basis of a proper search warrant?

(b) May a subordinate auditor for the Navy delegate the right to inspect the books and records of a prime defense contractor to subordinates in the Federal Bureau of Investigation?

(c) Is it lawful or proper to make out an affidavit for search warrant based upon an unauthorized inspection?

(d) Assuming, as the Government has admitted in this case, that no proper affidavit for search warrant was made

out for the search and seizure, are F. B. I. agents nevertheless authorized to make such seizure without a search warrant, or is the defense contractor protected in criminal proceedings by the provisions of the Fourth Amendment, and Sections 611 to 616 of Title 18, forbidding any search and seizure without a search warrant and without a showing of probable cause?

In a recent case of *Davis v. U. S.*, Second Circuit, No. 404, this term, this Court has granted certiorari where the Government contended it had a right to go on private premises and seize O. P. A. stamps without a search warrant, because the stamps were the property of the Government. In the present case, it is not contended that the books and records, Exhibits 32 to 45, were the property of the Government, nor was it ever contended that the check for $4,000.00, Government's Exhibit 7, was ever the property of the Government, or one that the Government had a right to inspect.

Government's Exhibit 7 was a private check on Zap's private bank account. It was seized November 5 without any warrant. The motion to suppress it was denied. It is, therefore, fundamentally important for this Court to determine whether there is a right to search and seize without a search warrant, as required by the Fourth Amendment to the Constitution of the United States, and by Sections 611 to 616, Title 18, United States Code, and use these documents in evidence in a criminal trial.*

*See statutes involved as Appendix in the Petition.

Under Title 10, United States Code, the Government is given the right of inspection of accounts and records of contractors, but by the terms of the amendment, 50 United States Code Appendix, Supplement 4, Section 643, and Executive Order 9127, that right is limited strictly to the agencies and the chairmen of agencies mentioned in the Executive Order. The Federal Bureau of Investigation is not mentioned in the order.

The authority to delegate the inspection is only given to the chairmen of the various departments specified in this Executive Order, to-wit, the Navy, the Army, the War Production Board, the Treasury Department, the United States Maritime Commission, and the Reconstruction Finance Corporation, solely to persons "within their respective departments and agencies."*

In any event, not even the Government claims that the Secretary of the Navy ever granted any authority to the Federal Bureau of Investigation or delegated any such authority. Its sole claim in this case is that one of the civilian cost inspectors gave permission to the Federal Bureau of Investigation agents to make the inspection. It is important for this Court to determine whether any agent in any of the departments thus mentioned by the Presidential Order, might, without the consent of the head of the department, or under any condition, permit some unauthorized person to inspect and seize the books

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*See pages 7, 8 of Petition.

and records of a prime defense contractor engaged in confidential work for the United States Navy. No cases, so far as we have been able to find, touch upon this fundamental question of criminal law under the Fourth and Fifth Amendments to the Constitution, and we believe it is important for this Court to grant a hearing to determine it.

Authority to delegate the right of inspection must be conferred either by statute or the executive order issued pursuant thereto. Otherwise the power does not exist.

> *Cudahy Packing Company v. Holland*, 315 U. S. 357, 363.

The right of inspection has always been and must be differentiated from the right of search and seizure.

> *People v. Richter* (N. Y.) 265 Appellate Division 767.

The right of inspection, even if it were deemed authorized, does not permit seizure. The Fourth Amendment to the Constitution forbids two things: (1) search, (2) seizure.

> *Boyd v. U. S.*, 116 U. S. 616, 641, 29 L. Ed. 752;
> *Takahashi v. U. S.*, 143 Fed. (2d) 118.

(e) The check for $4,000.00, Government's Exhibit 7, should have been suppressed under any circumstances. It is not claimed that this check was part of any books and records authorized or required to be kept. It was only claimed that the check was secured by a request from

Ethyl Boyle, the bookkeeper, who could not waive defendant's constitutional rights to his private, personal property. The decision of the District Court and the decision of the Circuit Court are, therefore, in conflict with the decisions of this Court.

Amos v. U. S., 255 U. S. 313, 65 L. ed. 654;
Gouled v. U. S., 255 U. S. 298, 65 L. ed. 647;
Weeks v. U. S., 232 U. S. 383, 58 L. ed. 652;
Boyd v. U. S., 29 L. ed. 752;
Agnello v. U. S., 70 L. ed. 145;
Goldman v. U. S., 316 U. S. 129, 86 L. ed. 1322;
Byers v. U. S., 71 L. ed. 520;
Silverthorne Lumber Company v. U. S., 64 L. ed. 317.

The record in this case also discloses that the books and records, Government's Exhibits 32 to 45, as well as the contents of Government's Exhibit 7, the check, were made out without the knowledge as to their contents by the petitioner. Miss Boyle testified that the petitioner was so busy she seldom saw him [R. 468], and that the petitioner frequently signed checks and other papers in blank for his employees to fill out when he was away from the office. [R. 468.]

It is, therefore, important that this court grant a hearing to determine these fundamental questions of search and seizure, and to protect petitioner under his fundamental rights.

II.

The District Court Erred in Failing to Give the Jury Any Instructions as to the Applicable Statutes on the Case, and the Decisions of the Courts Below Are, Therefore, in Conflict With This Court's Holding in Screws v. U. S., 89 L. Ed. 1029 at 1039.

This case also raises another fundamental question of criminal law and procedure. The petitioner having been charged in counts 4 and 5 with the offense of filing a false claim and making a false statement within the knowledge of the Government willfully and knowingly, the offenses required proof of specific intent on the part of the Government, and also required that the jury should know the exact statutory definition of the offenses so that it might measure the proof as against the requirements of the statute. When the court instructed the jury, it gave general instructions to the jury, but at no time gave specific instructions as to the statutes involved, as was done by the court in the case of *U. S. v. Bittinger*, 24 Fed. Cases, 1150 (Case No. 14,599), and in the case of *Bridgeman v. U. S.*, 140 Fed. 577, 592.

The decision of the Circuit Court affirming the judgment of the District Court, therefore, was in conflict with this court's holding in *Screws v. U. S.*, 89 L. ed. 1029 at 1039, where this court held that where the essential ingredients of the offense for which the conviction could be had was not submitted to the jury, that the court erred and this court reversed the judgment. It is respectfully submitted that the court below, in failing to give any instructions to the jury on the only offenses on trial, and defining the statutory offenses, is in conflict with this court's decision and with *Corson v. U. S.*, 147 Fed. (2d) 439, and the applicable law generally on this subject.

It is, therefore, important for this court to grant a hearing because of the decision in the court below, contrary to this court's holding in the *Screws* case and the law applicable generally to the matter of instructions regarding the specific offense for which the accused is in trial.

III.

The District Court Erred in Instructing the Jury That the Word Willful Means "Conduct Marked by Careless Disregard as to Whether or Not the Thing Done Is Lawful." [R. 689.]

The District Court also erred in the instruction that it gave regarding the word "willful". It is, therefore, important that this court grant a hearing because the instruction given by the District Court is contrary to the statute itself in this particular case, which requires guilty knowledge, and a specific intent, and cannot rest upon a careless disregard as to whether or not the thing done is lawful.

Under the instruction of the court the jury could very properly convict the appellant for carelessness in the acts of his employees, or for failing personally to check items of account. The statute was not designed to punish such acts, but to punish the deliberate "knowing and willful" filing of a false claim with evil intent and purpose as a positive act, or the willful making of a false statement as a positive act, or a willful trick, scheme or device as a positive act.

But guilty knowledge is made a specific part of Title 18, section 80, and the instruction flies in the face of that section.

This section not only requires allegation of knowledge and willfulness, but proof thereof.

But "conduct marked by careless disregard as to whether the thing done is lawful" is lack of knowledge through carelessness as against the clear requirements of the statute that one is only guilty who makes or presents a claim "knowing such claim to be *false, fictitious or fraudulent,*" or who shall "*knowingly and wilfully*" make or cause to be made a false or fraudulent statement or representation, etc.

Screws v. U. S., 89 L. Ed. 1029;

People v. Tiedeman, 120 Cal. 137.

IV.

The District Court Erred in Failing to Direct the Verdicts.

The verdicts should have been directed, because of variance between the pleadings and the proof, and because there was no proof of any guilty knowledge on the part of Zap.

The verdict should have been directed because of variance between the pleadings and the proof. Specification of error IV. [Assignment of Error No. 27—R. 759.]

The only claim which the Government sought to prove here was a claim for $4,300. We moved for a directed verdict on the ground that the indictment charges an item of $4,000 whereas the claim is for $4,300. Also on the ground that the item as far as McAvoy is concerned varied from the terms and facts alleged in the indictment. [H. 719.]

There is no claim for $4,000. A claim for $4,300 is surely not one for $4,000. We think that the motion to direct the verdict on this ground alone also should have been granted.

It was shown that Zap signed papers and checks in blank and left them to be filled in by his office help. It was also shown that whatever amounts were put on any checks were put there by direction of a certified public accountant and a bookkeeper, and without Zap's personal knowledge. [R. 467, 469; R. 221, 222.] Since the statute requires proof of specific knowledge and fraudulent intent, the failure to prove such knowledge or intent entitled the defendant to a directed verdict under the statute.

COUNT IV.

Count 4 alleges that the claim (which the Navy prepared itself and which was countersigned by Navy Inspectors) was for expenses for services "falsely therein set forth to have been rendered by McAvoy." The claim, which was public voucher introduced in evidence in this case as Government's Exhibit 19 [page 2 of Exhibit], does not falsely therein set forth that any monies were paid for expenses for McAvoy, but only lists "other direct charges." In the Federal Court, the proof must conform to the pleadings, and an indictment must be proved substantially as laid.

U. S. v. Corlin, 44 Fed. Supp. 940.

Furthermore, it was shown by the evidence that the authority for $4,000.00 was for flight tests and expenses, and the indictment, in alleging that the claim was false because the money actually had not been paid, is not proof that it had not been incurred, and that the obligation was due on items of flight testing, which are considered a part of the test, such as insurance of the pilot, the flying of the plane to and from the sight, the cost and expenses of the pilot, and many types of insurance. [R. 305, 487.]

COUNT V.

As to Count 5 it is alleged that the defendants Zap and Scott did falsify and conceal and did cover up by trick, scheme, and device, a material fact and make and cause to be made a false statement as follows:

> "On or about the 23rd day of September, 1942, defendants Edward F. Zap and Lloyd Scott did falsely *state* and *represent* to *Hilton Byars*, who was then and there the United States Navy Cost Inspector, that the sum of $4,000 had been paid to William H. McAvoy for acting as test pilot in conducting certain tests pursuant to said contract 83142 and did present to said Cost Inspector in support of said false statement and representation a cancelled check for $4,000 endorsed by said William H. McAvoy. The defendants had previously presented to said McAvoy a check in blank and requested said McAvoy to endorse the same. That said McAvoy did so endorse the same."

Nowhere in the record is there any evidence that the defendants, or either of them, falsely *stated*, or ever *stated* or *represented to Hilton Byars* that the sum of *$4,000* had been paid to McAvoy for acting as a test pilot. Byars did not so testify. Nowhere in the record is there any evidence that a cancelled check for $4,000 endorsed by William H. McAvoy was ever presented to the said *Cost Inspector* (Byars), in support of said *false statement*. [R. 516.] Byars did not so testify.

Keegan v. U. S.; 89 L. ed. 1314;

Schneiderman v. U. S., 320 U. S. 118, 136.

Other points are sufficiently set forth in our petition and fully urged herein.

Conclusion.

For the reasons stated in the petition and in this brief, the petition for rehearing and the application for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS LAVINE,

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

No. 489.—October Term, 1945.

Edward F. Zap, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 10, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

This case is here on a petition for a writ of certiorari from a judgment affirming the conviction of petitioner for violation of § 35(A) of the Criminal Code, 18 U. S. C. § 80.[1] 151 F. 2d 100.

Petitioner entered into contracts with the Navy Department under which he was to do experimental work on airplane wings and to conduct test flights. He was to be paid on a cost plus fixed fee basis. He arranged with a pilot to make certain test flights and paid him about $2500. Prior to the test flights he had the pilot endorse a blank check, telling him that it was to be used to defray the expenses for the test. He then filled in the test pilot's name as payee and $4000 as the amount of the check. The check was posted in petitioner's books of account as a payment to the test pilot. Later petitioner presented to the Navy Department a voucher for work under his contract. Supporting the claim was a document in which he certified that he had paid the test pilot $4000.

[1] "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

Congress has provided for the inspection and audit of books and records of contractors such as petitioner.[2] The inspection and audit were authorized to be made "by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board."[3] Certain officials of the government, including the Secretary of the Navy, were authorized to exercise the power; and they were also delegated the power to "authorize such officer or officers or civilian officials of their respective departments or agencies to make further delegations of such powers and authority within their respective departments and agencies."[4] And petitioner's contract with the Navy Department provided: "The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government."

For several weeks in 1942 agents of the Federal Bureau of Investigation conducted an audit of petitioner's books and records at his place of business and during business hours. They acted under the auspices and by the authority of an accountant and a cost inspector of the Navy Department under whose jurisdiction petitioner's books and records had been placed for pur-

[2] Sec. 10(1) of the Act of July 2, 1926, 44 Stat. 787, 10 U. S. C. § 310(1) provides: "The manufacturing plant, and books, of any contractor for furnishing or constructing aircraft, aircraft parts, or aeronautical accessories, for the War Department or the Navy Department, or such part of any manufacturing plant as may be so engaged, shall at all times be subject to inspection and audit by any person designated by the head of any executive department of the Government."

Title XIII, § 1301 of the Second War Powers Act of March 27, 1942, 56 Stat. 185, 50 U. S. C. App. Supp. IV, § 643 provides: "The provisions of section 10(1) of an Act approved July 2, 1926 (44 Stat. 787; 10 U. S. C. § 310(1) (giving the Government the right to inspect the plant and audit the books of certain Contractors), shall apply to the plant, books, and records of any contractor with whom a defense contract has been placed at any time after the declaration of emergency on September 8, 1939, and before the termination of the present war: *Provided*, That, for the purpose of this title, the term 'defense contract' shall mean any contract, subcontract, or order placed in furtherance of the defense or war effort: *and provided further*, That the inspection and audit authorized herein, and the determination whether a given contract is a 'defense contract' as defined above, shall be made by a governmental agency or officer designated by the President, or by the Chairman of the War Production Board." See H. Rep. No. 1765, 77th Cong., 2d Sess., pp. 12-13; S. Rep. No. 989, 77th Cong., 2d Sess., p. 9.

[3] See § 1301 *supra*, note 2.

[4] Executive Order No. 9127, issued April 10, 1942, 7 Fed. Reg. 2753.

poses of audit and inspection. During part of this period petitioner was absent. But while he was away, his employees granted the agents admission and cooperated with them by supplying records and furnishing information. When petitioner returned to the city, he made some protest against the examination. But the agents did not desist and continued to make the examination with the assistance of petitioner's employees. The $4,000 check was requested and it was given to one of the agents by petitioner's bookkeeper. It appears that the check was retained by the agent[5] and was introduced at the trial. The trial judge denied a motion to suppress the evidence. At the trial petitioner did not object to the admission of the check in evidence but later moved to have it stricken on the ground that it had been illegally obtained. The single question to which we limited the grant of the petition for a writ of certiorari is the propriety of the action of the District Court in allowing the check to be admitted.

As we have pointed out in *Davis* v. *United States*, No. 404, decided this day, the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived. And when petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts. Whatever may be the limits of that power of inspection, they were not transcended here. For the inspection was made during regular hours at the place of business. No force or threat of force was employed. Indeed, the inspection was made with the full cooperation of petitioner's staff. There is some suggestion that the search was unreasonable because made by agents of the Federal Bureau of Investigation who were not persons authorized to conduct those examinations. But they acted under the auspices and with the authority of representatives of the Navy Department who were authorized to inspect. The inspection was nevertheless an inspection by the Navy, though its officials were aided by agents of

[5] We accept that version of the episode. The other version is that the check was obtained under a search warrant. But the warrant was admittedly defective. So we treat the case as one where the check was seized without a warrant.

another department.[6] Moreover, the right to inspect granted by the contracts was not limited to inspections by the Navy but extended to inspections by any authorized representatives of the government among whom the agents of the Federal Bureau of Investigation are included.

The agents, therefore, were lawfully on the premises. They obtained by lawful means access to the documents. That much at least was granted by the contractual agreement for inspection. They were not trespassers. They did not obtain access by force, fraud, or trickery. Thus the knowledge they acquired concerning petitioner's conduct under the contract with the government was lawfully obtained. Neither the Fourth nor Fifth Amendment would preclude the agents from testifying at the trial concerning the facts about which they had lawfully obtained knowledge. See *Paper* v. *United States*, 53 F. 2d 184, 185; *In re Sana Laboratories, Inc.*, 115 F. 2d 717, 718. Even though it be assumed in passing that the taking of the check was unlawful, that would not make inadmissible in evidence the knowledge which had been legally obtained. *United States* v. *Lee*, 274 U. S. 559, 563. The agents did not become trespassers *ab initio* when they took the check. See *McGuire* v. *United States*, 273 U. S. 95. Had the check been returned to petitioner on the motion to suppress, a warrant for it could have been immediately issued.[7] Or during the inspection, the agents could have taken photostats or made copies of the check and offered them in evidence without producing the originals. *Lisansky* v. *United States*, 31 F. 2d 846, 850-851. *Darby* v. *United States*, 132 F. 2d 928, 929. The agreement to allow an inspection carried consequences at least so great. The question therefore is a narrow one. It is whether the check itself could be introduced at the trial.

Weeks v. *United States*, 232 U. S. 383, held that private property obtained as a result of an unlawful search and seizure could not be used as evidence in a criminal prosecution of the owner. As explained in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, the evidence so obtained is suppressed on the theory that the government may not profit from its own

[6] See Cravens v. United States, 62 F. 2d 261, 265.

[7] The Search Warrant Act, 40 Stat. 228, 18 U. S. C. § 612, permits the issuance of a search warrant for property used "as the means of committing a felony."

wrongdoing. But as stated in *McGuire* v. *United States, supra,* p. 99, "A criminal prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule." To require reversal here would be to exalt a technicality to constitutional levels. The search and the discovery were wholly lawful. A search warrant would be merely the means of insuring the production in court of the primary source of evidence otherwise admissible. Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts. We cannot extend the rule of the *Weeks* case so far as to bar absolutely the check itself. It was in the sound discretion of the District Court to admit it.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 489.—October Term, 1945.

Edward F. Zap, Petitioner,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[June 10, 1946.]

Mr. Justice Frankfurter, with whom Mr. Justice Murphy and Mr. Justice Rutledge concur, dissenting.

The views expressed in my dissenting opinion in *Davis* v. *United States*, decided this day, likewise compel me to dissent in this case.

The petitioner is an aeronautical engineer. He made a contract with the Navy Department to perform experimental work. In June, 1942, the Navy agreed that Zap should carry out test flights to determine the value of his experimental work. The tests were to be paid for by the Navy on a cost-plus-a-fixed-fee basis. Zap estimated that the cost of these flights would be $4,000, but he made arrangements for the tests at a fee of $2,500. Prior to the flights, the test pilot indorsed a blank check which he returned to the petitioner. The petitioner's auditor instructed the bookkeeper to make the check for $4,000 and deposit it in the petitioner's account. The check was posted on the petitioner's books for payment to the pilot, though in fact the pilot received only $2,500.

In October, 1942, petitioner presented a voucher to the Navy for reimbursement for the money laid out in making the tests. The voucher was supported by a reference to the check for $4,000. From October 20, to December 1, 1942, two F. B. I. agents conducted an audit of the petitioner's books and papers, under the auspices of an accountant and inspector of the Navy. During this investigation one of the F. B. I. agents demanded and received the cancelled check for $4,000 made out to the pilot and endorsed by him. The agent retained the check. On December 1, 1942, one of the agents swore out an affidavit on the basis of which a search warrant was issued for the books and papers of the petitioner, and these books and papers were taken under the warrant. The war-

rant, it is conceded, was defective, inasmuch as the affidavit failed to show the necessary probable cause for the belief that the petitioner had committed an offense to warrant the seizure.

The petitioner was convicted of defrauding the government. Criminal Code, § 35A, 35 Stat. 1088, 1095, 40 Stat. 1015, 48 Stat. 996, 52 Stat. 197, 18 U. S. C. § 80. He made a timely motion to suppress the cancelled check and other records. The motion was denied, the documents were admitted in evidence, conviction and its affirmance followed. 151 F. 2d 100. The sole question before us is the validity of the seizure.

I agree that the government had authority, as a result of its contract with the petitioner and the relevant statutes, to inspect the petitioner's books and records, 44 Stat. 780, 787, 10 U. S. C. § 310(1), 56 Stat. 176, 185, 50 U. S. C. App. § 643, and that the Navy Department could utilize members of the F. B. I. for this purpose. Accordingly, the search was legal and the inspectors could testify to what they had gleaned from the inspection. But, as is pointed out in my dissent in *Davis* v. *United States*, decided this day, the Constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. And that is the issue here. The legality of a search does not automatically legalize every accompanying seizure.

The Government argues very simply that the seizure was authorized since the seized items were uncovered in a lawful search. But this is to overlook what we ruled in *Marron* v. *United States*, 275 U. S. 192, 196: "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant." If where a search instituted under the legal process of a warrant, which also authorizes seizure, does not permit seizure of articles other than those specified, statutory and contractual authority merely to search cannot be considered sufficient to grant that power. The Government relies on a doctrine quite inapposite here. If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized. But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of a different color.

Petitioner's right to possession was clearly recognized by the agents when they sought a warrant for the purpose of securing the evidence. That warrant was defective, however, and could not authorize the seizure. The Government deems this a "technical error." It is a "technicality" of such substance that this Court has frequently announced the duty to suppress evidence obtained by such defective warrants. *Cf. United States* v. *Berkeness*, 275 U. S. 149; *Grau* v. *United States*, 287 U. S. 124; *Sgro* v. *United States*, 287 U. S. 206; *Nathanson* v. *United States*, 290 U. S. 41. The fact that this evidence might have been secured by a lawful warrant seems a strange basis for approving seizure without a warrant. The Fourth Amendment stands in the way.

I would reverse the judgment.